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NO. 84-489

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1984

Commonwealth of Pennsylvania
Bureau of Correction

Petitioner

v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,
DEPUTY SHERIFF JOHN DOE,

Respondents

Appeal from the Judgment of
The United States Court of Appeals
For The Third Circuit

BRIEF OF PETITIONER

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58 pp

QUESTION PRESENTED

Whether a district court has the authority to direct the United States Marshal's Service to share responsibility with state officials for the production of state inmates to appear in federal district court for the trial of a civil action in which neither the state nor its officials is a party.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-489

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION,

Petitioner

vs.

UNITED STATES MARSHALS SERVICE, et al.,

Respondents

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 4a-45a) is reported at 737 F.2d 1283. (hereinafter "Pet. App. ____.")

The memorandum and order of the magistrate (Pet. App. 46a-65a) is not reported.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this case.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a - 3a) was entered June 27, 1984. The petition for writ of certiorari was docketed on September 24, 1984. Certiorari was granted on February 19, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The All Writs Act, 28 U.S.C. §1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C. §2241, provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless --

(5) It is necessary to bring him into court to testify or for trial.

3. 28 U.S.C. §2243 provides in pertinent part:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, ... shall be directed to the person having custody of the person detained.

* * *

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

4. 28 U.S.C. §567:

Under regulations prescribed by the Attorney General, each United States Marshall shall be allowed --

* * *

(2) The expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards ...

5. 28 U.S.C. §569:

(a) The United States Marshal of each district is the marshal of the district court .... and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under the authority of the United States, ... and command all necessary assistance to execute their duties.

STATEMENT OF THE CASE

This action began when a prisoner, Richard Garland, brought a civil rights suit pursuant to 42 U.S.C. §1983 against various Philadelphia County officials alleging that they had violated his rights by beating and harassing him. The matter was referred to a magistrate by consent of the parties for disposition on the merits, pursuant to 28 U.S.C. §636(c)(1). In the course of the proceedings, on February 8, 1983, the magistrate ordered the superintendents of various state prisons to transport the plaintiff-inmate and other inmate witnesses to the county prison nearest the United State

Courthouse.[2] In the same orders, the magistrate further directed the United States Marshal [hereinafter "Marshal"] to transport the inmates from the county jail to the federal court and to maintain custody over these inmates during their appearances in court. (J. App. 36a - 41a[3])

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[2]Plaintiff, Garland, was confined in a Philadelphia County jail when he initiated the lawsuit; however, at all times relevant to the issues raised in this appeal, he was in custody of the Pennsylvania Bureau of Correction at its institution at Huntingdon, Pennsylvania which is approximately 220 miles from Philadelphia. Two of the witnesses were confined at the State Correctional Institution at Rockview (approximately 218 miles from Philadelphia) and at the State Correctional Institution at Dallas (approximately 143 miles from Philadelphia). Pet. App. 8a The county jail nearest the federal courthouse is the Philadelphia Detention Center, which is approximately 5 miles from the courthouse.

[3]"J. App." refers to the joint appendix filed in this case.

The Marshal, an intervenor in the action,[4] moved for reconsideration of that portion of the magistrate's order which apportioned to it the responsibility of transporting the prisoner-witnesses from the county jail to the federal courthouse, and thereafter of maintaining custody of the prisoners while in the courthouse.[5] The Marshal's motion for reconsideration was denied. In rejecting the motion for reconsideration, the magistrate viewed his orders to the Marshal as authorized by 28 U.S.C. §569(b). Pet. App. 52a-55a.

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[4]On April 20, 1983, intervenor status was granted to the Commonwealth of Pennsylvania, Bureau of Correction and to the Marshal, nunc pro tunc as of May 7, 1982 and January 19, 1983 respectively.

[5]The Commonwealth did not appeal from the portion of the order which directed it to transport the inmates to Philadelphia.

The court reasoned that the order was ancillary to the writs of habeas corpus ad testificandum issued pursuant to 28 U.S.C. §2241(c)(5). Since Section 569(b) required the Marshal to execute all lawful writs and orders, the court determined that there was authority for its orders.

The magistrate supported his orders with pragmatic concerns. He noted that, as a general matter, the increased volume of litigation by prisoners has produced a strain on governmental and judicial resources. Pet. App. 57a. Correspondingly, the need for writs of habeas corpus ad testificandum has swelled. Turning to the peculiar circumstances of tnis case, the magistrate observed that his orders required the production of three prisoners who were incarcerated at

different prisons, all a considerable distance from the courthouse. Pet. App. 58a-59a. This imposed a significant financial burden on the state. Pet. App. 59a. In attempting to alleviate, to the degree possible, this financial strain, the magistrate drew upon his intimate familiarity with the Marshal's regular duties; namely, that the Marshal makes frequent trips to the Philadelphia Detention Center, which is close to the courthouse. Pet. App. 59a-60a. It was on this basis that the magistrate concluded that, on balance, it would be equitable and in the interest of justice to relieve the state of, and impose on the Marshal, the limited obligation of transporting the prisoners from the county facility to the federal courthouse.

The Marshal appealed.[6] The Third Circuit Court of Appeals held that the District Court, and therefore the magistrate, has the statutory authority to direct the Marshal to maintain custody over a state prisoner-witness in the federal courthouse but that the court lacks authority, without a finding of special security circumstances, to order the Marshal to transport that prisoner between the county jail and the federal courthouse.

In the lead opinion by Judge Gibbons, the Court of Appeals began its analysis of the issue by focusing on the source of judicial authority to issue

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[6]The subject of the appeal is entirely collateral to the underlying action, disposing of the transportation issue fully and finally; hence, the Court of Appeals held that it had jurisdiction under the "collateral order" doctrine as described in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

writs, process and orders. It pointed out that 28 U.S.C. §569(b), relied upon by the magistrate, is merely a directive to the Marshal to execute writs when they have been issued pursuant to some other authority. The court then turned to the All Writs Act, 28 U.S.C. §1651, to determine whether this statute authorizes a district court to order the Marshal to assume any transportation responsibility for state inmates. The court did not find such authority in the All Writs Act, holding, instead, that the magistrate's order was, in fact, a writ of habeas corpus ad testificandum properly addressed to the custodian, with a mandamus added to it directed to the Marshal. The court then concluded that the mandamus was inappropriate, relying on McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268

(1821). Judge Gibbons did conclude, however, that the magistrate properly ordered the Marshal to maintain custody of the prisoners while they are in the federal courthouse but that unless

> a federal court makes a specific finding that security circumstances exist which require an order that state prisoner witnesses be taken into the marshal's custody at a situs away from the federal courthouse, §569(a) does not authorize such an order.

Pet. App. 22a - 23a.[7]

Judge Becker, concurring as to the courthouse custody issue and concurring in the judgment, expressed some serious bewilderment with McIntire and McClung. He noted that the result here undercut the flexibility which should be accorded to district courts to deal with problems of this nature and

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[7]The Marshal did not file a cross-petition on the courthouse custody issue.

might discourage the courts from ordering the production of prisoners to testify. Judge Atkins dissented in part, concluding that the magistrate's order was proper in every respect.

SUMMARY OF ARGUMENT

1. a. The Court of Appeals' restrictive interpretation of the All Writs Act, 28 U.S.C. §1651, fails to recognize the flexible character of this statute. The clearly broad language of this Act manifests Congressional intent to give federal courts the power to fashion orders and writs which will meet the challenges of an evolving jurisprudence.

b. The order issued in this case was a proper exercise of the court's discretion. The magistrate properly weighed the substantial burden on the state custodians and the minimal burden on the Marshal in determining that a transfer of custody was appropriate.

2. The habeas corpus statute upon which the district court relied, 28

U.S.C. §2241, does not compel the district court to address a habeas corpus ad testificandum writ exclusively to the custodian, neither does it preclude a transfer of custody from the custodian to the United States Marshal. Moreover, the Marshal has a statutory obligation to obey the lawful orders and writs of the federal courts, 28 U.S.C. §569(b), and is statutorily authorized to expend funds for the specific purpose of transporting prisoners. 28 U.S.C. §567.

Argument

I. THE COURT OF APPEALS' RESTRICTIVE INTERPRETATION OF THE ALL WRITS ACT GOES AGAINST THE CLEAR MEANING OF THE STATUTE AND THE INTERPRETATION GIVEN IN THE DECISIONS OF THIS COURT

This Court is well aware that the number of federal civil rights actions filed by state prisoners has risen dramatically in recent years. This increase has been accompanied by a similarly dramatic drain on the state's financial resources simply because the state happens to be the custodian of inmates who are prosecuting suits which, as here, often do not even involve a state official as a defendant. The veritable deluge of such civil rights actions is a recent phenomenon in American jurisprudence, one certainly unforeseen at common-law; consequently,

the tools available to the judiciary must be used creatively in order to respond to the changing demands on the judicial system. The need for such flexibility was foreseen by Congress when it enacted the All Writs Act, 28 U.S.C. §1651; under the aegis of this statute and its predecessors,[8] this Court has responded to the legislative invitation by approving new tools fashioned by lower courts faced with new problems.

It is undisputed that the magistrate who issued the writs in question here is vested with jurisdic-

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[8]What is now Section 1651 originated as a part of Section 14 of the First Judiciary Act. 1 Stat. 81-82 (1789) and later became R.S. § 716 (1875). After further amendment it took on its present form. See Carbo v. United States, 364, U.S. 611, 615-616 (1961).

tion to hear the case.[9] Pursuant to 28 U.S.C. §2241(c)(5) he issued writs of habeas corpus ad testificandum directing the state to transport the plaintiff and his witnesses from the various state institutions in which they were incarcerated to the county prison nearest the federal courthouse and then to surrender plaintiff and his witnesses to the Marshal for the limited purpose of their court appearance. Pet. App. 51a. The magistrate's orders to the prison superintendents to surrender custody of the prisoners were to be executed by the Marshal; this, pursuant to 28 U.S.C. §569(b) which provides that

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[9]Plaintiff's complaint alleges jurisdiction pursuant to 28 U.S.C. §§1331-1343, with the Civil Rights Act as the remedial vehicle.

Marshals shall execute all lawful writs and orders issued under the authority of the United States. Pet. App. 52a. So the first condition under Section 1651, that the case be "in aid of" the court's jurisdiction, is satisfied.

The Court of Appeals' holding that the magistrate was without authority under the All Writs Act to fashion that portion of the order which was addressed to the Marshal followed what can only be termed a cursory analysis of this Court's teachings in United States v. New York Telephone Co., 434 U.S. 159, 171 (1977); Harris v. Nelson, 394 U.S. 286 (1969); and Price v. Johnston, 334 U.S. 266 (1948). In fact, in each of these cases, this Court reaffirmed the flexibility of the All Writs Act, recognizing it as a judicial arsenal from which courts can develop new tools as the need arises.

In Price, the issue was whether a court of appeals had the power to order a prisoner to be brought before it to argue his own appeal. After reviewing the various writs available at common law[10] the Court pointed out that none

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[10]The Court focused on 3 Blackstone's Commentaries 129-132:

(1) Habeas corpus ad respondendum. Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."

(2) Habeas Corpus ad satisfaciendum. Issued "when a prisoner hath had judgment issued against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with the process of execution."

(3) Habeas corpus ad prosequendum, testificandum, deliberandum, etc. Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.

(4) Habeas corpus ad faciendum et recipiendum. This "issues out of any of

FOOTNOTE CONTINUED ON NEXT PAGE

had been used for the purpose of producing a prisoner to argue an appeal. This, however, did not mean that a writ in the nature of habeas corpus could not be issued. The Court stated:

> [W]e do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under §262 of the Judicial

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE
the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant together with the day and cause of his caption and detainer (whence the writ is frequently denominated an habeas corpus cum causa), to do and receive whatsoever the king's court shall consider in that behalf."

(5) Habeas corpus ad subjiciendum. The "great and efficacious writ" which is directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, ad faciendum, subjiciendum, et recipiendum, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."

334 U.S., at 281.

> Code,[11] is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of "law", a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the habeas corpus writ authorized by §262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read §262 as an ossification of the practice and procedure of more than a century and a half ago. Rather, it is a legislatively approved source of procedural instruments designed to achieve "the rational ends of law."

334 U.S., at 282.

Judge Becker, who concurred in portions of the lead opinion and concurred in the judgment below, found that the magistrate could not issue the writ to the Marshal pursuant to 28

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[11] §262 of the Judicial Code is the statutory precursor to 28 U.S.C. §1651.

U.S.C. §1651 because

> there is a difference between the creation of new writs to satisfy new needs and the expansion or modification of existing writs. With the latter the traditional forms and doctrine may be said to express the limits of the writ.

Pet. App. 31a.

This view was expressly rejected in Price:

> The ordinary forms and purposes of the writ may often have little relation to the necessities of the appellate jurisdiction of those courts. Justice may on occasion require the use of a variation or modification of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in §262.

334 U.S., at 283-84 (emphasis supplied). Here, as[12] in Price

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[12] Price also points out the Court of Appeals' error in rigidly compartmentalizing its discussion of habeas corpus and the All Writs Act.
FOOTNOTE CONTINUED ON NEXT PAGE

because times have changed, and so have the needs of the courts, the All Writs Act provides the necessary authority for modifications of existing modes of procedure.

Similarly, in Harris, the Court held that, despite the absence of direct statutory authority, the district court properly issued a discovery order in connection with a habeas corpus proceeding. Referring to the All Writs Act, the Court observed:

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

Although recognizing that the writ at issue was "in the nature of a writ of habeas corpus," 334 U.S, at 279, the Price Court analyzed the case and approved issuance of the writ under the All Writs Act, not Section 2241. These statutes should be read as supplementary to one another in light of their common origin. 1 Stat. 81-82 (1789). See also Carbo v. United States, 364 U.S. 611, 614-617.

> This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"

394 U.S., at 299. (citations omitted).

More recently, in New York Telephone Company, the Court affirmed a district court order directing a telephone company, which was not a party to the original action, to assist the FBI in installing pen registers. The Court acknowledged the limits of its power to impose duties upon third parties in holding that "unreasonable burdens may not be imposed;" however, the order of the district court was deemed authorized by the All Writs Act and consistent with congressional intent. 434 U.S., at 172.

The order of the magistrate here clearly falls within the guidelines set

forth by this Court's decisions. It is in the interest of justice for a federal court to fashion a procedural device which allows it to exercise its jurisdiction in civil rights litigation and to do so with a sensitivity to the interests of all the parties concerned.[13]

Consistent with these cases, petitioner contends only that the district court has discretion in appropriate cases to call upon the Marshal for assistance. See Price v. Johnston, supra, 334 U.S., at 284.

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[13]As Judge Becker noted below, a district court faced with a request to produce a prisoner must consider, in addition to the need for the testimony, the cost and burden of production. Pet. App. 42a. A ruling which limits the district court's flexibility in these matters may cause those courts to deny production requests in marginal cases. This may adversely affect the administration of justice.

"[T]his discretion is to be exercised with the best interests of [all parties] . . . in mind." Ibid. Here, the magistrate properly considered several factors in arriving at his decision, among them (1) the interest of the plaintiff in being present at trial and having his witnesses present as well; (2) the Commonwealth's burden in transporting prisoners from various state prisons, all considerably distant from Philadelphia;[14] (3) the Marshal's frequent trips to the nearby county jail, which minimized any burden on the Marshal. Although the assistance of the Marshal was, perhaps, not strictly necessary in this case, it certainly was "appropriate" and a proper exercise of discretion under the facts of this

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[14] See note 1, supra.

case. See U.S. v. New York Telephone Co., supra, 434 U.S., at 173. Pet. App. 59a.

Although it may appear at first blush that, once the inmates are transported to the Philadelphia area, the burden is the same whether undertaken by the Marshal or the state, practice proves this assumption to be untrue. State prisoners needed for court in Philadelphia are transported to the State Correctional Institution at Graterford, located 35 miles from the federal courthouse. When the prisoners are needed in court, corrections officers must be taken from their normal duties to transport the prisoners to Court and remain there until their appearances are completed. In practice, this often wastes an entire day for these officers. By contrast, as the

magistrate found, the Marshal makes regular trips to the nearby Philadelphia Detention Center in the course of his normal duties. Pet. App. 59a.

In formulating his order, the magistrate was faithful to the authority granted him under the All Writs Act[15] and mindful of the guidance of this Court in considering the burden to third parties -- here the Commonwealth and the Marshal.

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[15]Although the magistrate did not specifically rely on 28 U.S.C. §1651, the order conforms to that statute's requirements as interpreted by this Court.

II THE DISTRICT COURT ORDER TRANSFERRING CUSTODY FROM THE STATE CUSTODIAN TO THE MARSHAL WAS AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW.

A. The Order Did Not Conflict With The Habeas Corpus Statute.

1. According to the reasoning of the Court of Appeals, the magistrate's order amounts to a writ of habeas corpus ad testificandum properly directed to the custodian and the order to transfer custody to the Marshal is an unauthorized attempt to shift the burden of responding to the civil process from the Commonwealth of Pennsylvania to the United State Treasury. In so holding, the court misconstrued the limits of 28 U.S.C. §2241, the habeas corpus statute upon which the magistrate relied. While it is true that traditional wisdom teaches that the writ of habeas corpus has been directed to the custodian, the

statutory construction given this statute by this Court cautions against lumping all writs of habeas corpus together under one rubric.

In Carbo v. United States, 364 U.S. 611 (1961), the Court was presented with the issue of whether the territorial limitations in §2241(a) apply to a writ of habeas corpus ad prosequendum. After analyzing the historical bases and practical consequence of applying territorial limitations to a writ which seeks to have an inmate transported from one jurisdiction to another to stand trial, the Court held that the writ of habeas corpus ad prosequendum has no geographical limitations on its use, but that the territorial limitations make sense when applied to the Great Writ with which §2241 is principally

concerned.[16]

The Court of Appeals here has assumed, without discussion, that federal courts are without authority to fashion a writ of habeas corpus ad testificandum and to require a transfer

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[16]Although this Court has not decided whether writs of habeas corpus ad testificandum may issue outside a district court's territorial limits, Carbo v. United States, 364 U.S. 611, 618 fn. 13 (1961), some circuit courts have held that there are no territorial limits on such writs. Itel Capital Corp. v. Dennis Mining Supply and Equipment, Inc., 651 F.2d 405, 406, 407 (5th Cir. 1981); Stone v. Morris, 546 F.2d 730, 737 (7th Cir.1976). This extension of the writ, coupled with states' participation in cooperative compacts which permit inmates sentenced in one state to be confined in another, can generate unbearable transportation burdens for states if they alone, as custodians, are to be held responsible for producing inmates in federal court to testify in civil actions with which the state has no connection.

of custody.[17] The law is simply not so clear. In fact, Carbo suggests a contrary result:

> [r]igid formulae, even as to the issuance of the Great Writ, may be tempered by factual considerations requiring the decision that its "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court" after suit was begun.

364 U.S., at 621, quoting Ex Parte Endo, 323 U.S. 283 (1944).

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[17]The Court of Appeals' reliance on hornbook law, 97 CJS Witnesses §30 c (1957), for the proposition that that the custodian is responsible for the production of a prisoner pursuant to a writ of habeas corpus ad testificandum (Pet. App. 27a) does not go far enough; that section provides further that "where the testimony is desired in a civil action or proceeding, such custodian is tendered or paid the expenses of bringing up and returning his prisoner, but without being tendered such expenses where the writ is issued at the instance of [the] accused in a criminal prosecution...." (footnoted omitted).

Section 2241 describes the court's power to grant a writ and authorizes the writ of habeas corpus ad testificandum under §2241(b)(5); this section does not specify to whom such a writ should be directed. If we look at §2243, which deals with the issuance, return and hearing on a writ, its provisions suggest that this section, like the provision examined in Carbo, is concerned primarily with the Great Writ; it states in part:

> The writ, or order to show cause shall be directed to the person having custody of the person detained.
>
> . . .
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> ...
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The critical and indispensable presence of the custodian is obvious when we consider that the Great Writ challenges the very detainment to which the petitioner is subject and it inevitably falls upon the custodian to produce the prisoner and explain the reasons for the detention. Moreover, if the prisoner's arguments succeed, the result is that he will be ordered released. McNally v. Hill, 293 U.S. 131, 136 (1934); Wales v. Whitney, 114 U.S. 564, 574 (1885). Under these circumstances it is understandable that the custodian should be present with the prisoner.

In this case, we are not dealing with a writ which challenges the detainment of an inmate; on the contrary, the inmate is sought to give testimony in a civil case in which he is either the plaintiff or a witness. The

custodian has absolutely nothing for which to answer to the court which goes to the merits of the detainment itself. Here the custodian is a third party, a stranger to the litigation who becomes enmeshed in the lawsuit solely because a party or a witness happens to be lawfully incarcerated. Indeed, if the nature of the writ does not impose on the custodian a duty to answer and the custodian is willing to relinquish custody, it makes no sense to insist, for the sake of tradition suited to the Great Writ, that the custodian be the only one who can produce the body.

The Marshal's (Br. in Op., P. 3-4) and the Court of Appeals' (Pet App. 17a) concern that this case represents merely an attempt to dip into the "deep pocket" of the United States is both exaggerated and misplaced. There is no evidence on this record of any

substantial burden, financial or otherwise, which the orders place on the Marshal. The magistrate carefully balanced the relevant factors, including any burden on the Marshal, before rejecting the Marshal's challenge. Presumably, if a substantial burden is shown in any case, the magistrate or district court will, in the proper exercise of discretion, decline to order transfer of custody.

Moreover, the deep pocket argument is particularly hollow when it is put in context. This is a case in federal court and involves the vindication of federal rights. The United States pays for the courtroom, the judge, and the clerks. Utilization of the Marshal's services hardly represents such an uncharacteristic

or unprecedented burden on the Treasury as the Marshal would have the Court believe.

Consequently, under these circumstances, it is reasonable, and consistent with the habeas corpus statute, to direct that the writ to produce the body to testify be executed by a third party such as the Marshal who is statutorily obligated "to execute all lawful writs, process and orders issued under authority of the United States." 28 U.S.C. §569(b).

2. The authority of the district courts to seek assistance from the Marshal has been recognized by four other circuits which have dealt with the issue of apportioning transportation responsibility for state prisoners who are needed to testify in federal civil rights actions. In Ballard v. Spradley,

557 F.2d 476 (5th Cir. 1977), the court of appeals affirmed a district court order which allocated to the state responsibility for the transportation of a prisoner from the state jail to the county jail near the federal courthouse and gave the Marshal the responsibility of transportation between the county jail and the federal courthouse, as well as for security during the trial. Relying on §569(b), the Ballard court stated:

> The raison d'etre of the Marshals Service is to service the federal forum in civil as well as criminal litigation. Congress has directed the Marshals may, in the discretion of the district court, where they are located, "be required to attend any sessions of court *** execute all lawful writs ... and command all necessary assistance to execute its duties." 28 U.S.C. §569(a), (b).

Id. at 481.

Similarly, in Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978), the court of appeals held that a state warden was entitled to reimbursement from the Marshal where the warden provided transportation for an inmate in a civil case. More specifically, the district court entered an order directing both the state warden and the Marshal to transport the plaintiff-inmate to federal civil proceedings in which state prison officials were named as defendants. The Marshal informed the warden that the Marshal's Office would not transport the prisoner. The state warden proceeded to transport and supervise the prisoner during trial and thereafter sought reimbursement from the Marshal for the expenses incurred. The district court denied reimbursement. The court of appeals reversed, and stated:

> We do note, however, and consider it a serious matter, that the Marshal decided that all that was necessary on his part was to notify the Warden that the Marshal's Service would not transport the prisoner. Although a motion to modify the writ had been filed, that motion had not been ruled upon at the time of trial and 28 U.S.C. §569(b) clearly required that the Marshal execute the writ. The fact that a controversy may have existed as to who should actually transport and suffer the expense of producing the prisoner had no effect upon the existing writ and did not authorize the Marshal to independently disregard a direct order of the court.

Id., at p. 407.

The Ninth Circuit also relied on 28 U.S.C.§569(b) in holding that a district court has discretion to allocate costs of compliance with a writ of habeas corpus ad testificandum issued pursuant to 28 U.S.C.§2241. Wiggins v. County of Alameda, 717 F.2d 666 (9th Cir. 1983), cert. denied sub nom, California Department of Corrections v. United States, 104 S. Ct. 1425 (1984).

Finally, in the most recent decision from an appellate court,[18] Ford v. Allen, 728 F.2d 1371 (11th Cir. 1984), the court affirmed the order of the district court which required the Marshal to bear the entire habeas corpus ad testificandum responsibility for producing a state prison inmate in federal court to testify against county employees. Each of these courts has focused on 28 U.S.C. §569(b) as the

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[18]The Eighth Circuit has presently before it an appeal from a decision of a district court in Arkansas which held that pursuant to 28 U.S.C. §2243, and absent a showing of substantial unreasonableness, the custodian state department of corrections is the only party responsible for the transportation of inmates who are the subject of a writ of habeas corpus ad testificandum issued by a federal court in a civil rights case. McGee v. Rankin, 584 F. Supp. 1202 (1984) on appeal sub nom. Arkansas Department of Corrections v. United States Marshals Service, No. 83-2128-WA (8th Cir.).

statutory basis for the district court's power to order the Marshal to undertake some or all the responsibility of producing state prisoners for civil proceedings in federal court.

To enable the Marshal to discharge his duties pursuant to §569(b), there is specific statutory authority permitting the Marshal to expend funds for the transportation of prisoners. In fashioning his order, the magistrate correctly relied on the provisions of 28 U.S.C. §567 which states:

> Under regulations prescribed by the Attorney General each United States Marshal shall be allowed --
>
> * * *
>
> (2) The expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards;

Further authority for the expenditures here in question may be found in 28 C.F.R. §0.111 which lists the general functions of the United States Marshals Service. Among the enumerated duties of the Marshal are:

> §0.111(b)
>
> The service of all civil and criminal process emanating from the federal judicial system including the executing of lawful writs and court orders pursuant to §569(b), Title 28, United States Code.
>
> §0.111(j)
>
> Receipt, processing and transportation of prisoners held in the custody of a Marshal or transported by the United States Marshals Service under cooperative or intergovernmental agreements.

The language is clear in §567(2) and the pertinent provisions of the Code of Federal Regulations: the Marshal is unequivocally authorized to expend funds

for the transportation of prisoners, whether they be federal prisoners or state prisoners in the temporary custody of the Marshal.[19]

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[19]The Marshal's own internal regulations recognize both the necessity of transferring custody of state prisoners to the Marshal and reimbursement of travel expenses to state custodians:

STATE PRISONERS

Expenses Incident to Production Prisoners In Federal Court --

If the state authorities desire to produce the requested prisoner at the place of trial under state guard, the state should advance the guard and prisoner the necessary expenses for travel. The U.S. Marshal should reimburse the state for the expenses and advance any remaining necessary allowances, all of which are to be charged to "fees and Expenses of Witness" appropriation. However, because of the excess costs involved in this procedure, the U. S. Attorney has been instructed that it would be more preferable to have the prisoner placed in the custody of the U.S. Marshal of the district in which the institution is located.

FOOTNOTE CONTINUED ON NEXT PAGE

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

State prisoners in the temporary custody of the U.S. Marshal cannot be turned over to a second state requesting custody.

It is the Marshals Service's position that in Federal civil rights suits filed by state prisoners against state officials the state should transport the prisoner to and from the Federal Court and bear any of the prisoners (sic) having expenses. The Marshals Service should not reimburse the state for any of their expenses. If the Marshal is ordered to transport such prisoners, the United States Marshals Service Legal Counsel should be immediately notified.

United States Marshals Financial Management Manual, July 1, 1975, p. 340.26 (emphasis supplied).

B. The All Writs Act Authorizes An Order Against Federal Officials.

The Court of Appeals read McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821), as precluding reliance upon the All Writs Act, 28 U.S.C. §1651, for the order issued in this case, which the court construed as a writ of mandamus against federal officials. Even if the Court of Appeals correctly characterized the order as a mandamus, its conclusion was incorrect.

McIntire held only that a mandamus could not issue because the circuit courts, at that time, had not been vested by Congress with jurisdiction to decide the types of claims at issue in that case (i.e., the right to a land patent). In fact, the Court adverted to the availability of

mandamus in a proper case, noting that

> [h]ad the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act [the predecessor of 28 U.S.C. §1651] would sanction the issuing of the writ for such a purpose.

11 U.S. [7 Cranch], at 506.

McClung v. Silliman, the other case relied upon by Judge Gibbons (and the case which so troubled Judge Becker) likewise does not support the decision of the Court of Appeals. Although McClung is admittedly somewhat hard to follow, its essence is the Court's conclusion that no authority could be found for the proposition that a state tribunal had jurisdiction to issue a writ of mandamus against a federal official; such authority certainly could

not be lightly inferred when Congress had refused to delegate the power to the federal courts. Id. at 604. As the Court later had occasion to observe, "[t]he only question directly before the court [in McClung], was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 617 (1838). As such, McClung is a case resting on the sovereign immunity of federal officials which protects them from litigation in state courts.

Even if the Court of Appeals correctly interpreted McIntire and McClung, a great deal has changed since those decisions. The federal trial courts now have general federal question jurisdiction, 28 U.S.C. §1331, and the

district courts have specific statutory authority to issue writs of mandamus to federal officers and employees, 28 U.S.C. §1361. If anything, McIntire and McClung today stand only for the proposition that the All Writs Act permits federal, but perhaps not state, courts to issue writs in the nature of mandamus against federal officials if the case otherwise is within the court's jurisdiction. This civil rights action being properly within the District Court's jurisdiction, its ancillary order to the Marshal was authorized by law.

CONCLUSION

On the basis of the foregoing arguments and authorities, petitioner respectfully requests that the decision of the Court of Appeals be reversed and that the order of the magistrate be affirmed.

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